Court of Appeals No. 50227-5-II

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IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

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MAUREEN HAY, et al.,
Appellants,
v.
AAA FRAMING CORPORATION, et al.,
Respondents.

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# BRIEF OF RESPONDENTS BEST QUALITY FRAMING #1, LLC AND ABSI BUILDERS, INC.

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## I. INTRODUCTION

Best Quality Framing #1, LLC (hereinafter "BQF") and ABSI Builders, Inc. (hereinafter "ABSI") are Third-Party Defendants in the underlying lawsuit, in Pierce County Superior Court Cause Number 14-2-08793-0 ("Underlying Lawsuit") and are Respondents herein.

BQF and ABSI were subcontractors to Highmark Homes, LLC (hereinafter "Highmark"), the developer and general contractor on the Valley Haven project (hereinafter "Project"). *See* Initial Brief of Appellants at pg. 2. BQF and ABSI moved for summary judgment against Highmark on all claims. CP 1620 – 1640 and CP 1703 – 1717. The Homeowner Plaintiffs in the Underlying Lawsuit (hereinafter collectively referred to as "Hay"), now appeal the orders dismissing Highmark's claims against BQF and ABSI. CP 2147– 2154; CP 2357. Hay is appealing pursuant to an assignment, which was not part of the underlying record.

Other than a general allegation that BQF and ABSI performed some framing or siding on some of the homes at the Project, the underlying summary judgment record lacks any factual evidence regarding what specific work each subcontractor agreed to perform. The record also lacks any factual evidence regarding what portions of the work, if any, were not completed as agreed to by the contracting parties.

On appeal, Hay makes broad, factually unsupported, arguments about whether subcontractors in general are required to follow building codes and master subcontracts.

The facts on appeal are simple. Highmark and Hay failed to provide evidence of the essential elements of a breach of contract, including the subject matter of the contract, the promise, the terms and conditions, and price. There was no written proposal, estimate or other document that incorporated specific plans, specifications, or a scope of work to be performed at the Project. There was no written contract that identified what portions of what buildings the subcontractors agreed to work on. There was no evidence regarding whether the scope of work to be performed included installation of a weather resistive barrier, specific types of flashings, windows, or other components. There was no evidence regarding which person or entity was responsible for doing what portions of the work on which home. There was no document incorporating by reference any alleged master agreement for this Project, or any home within the Project. The underlying record is virtually nonexistent in showing what the agreements were and exactly what work was to be performed. Highmark failed its burden of proof to show what work the subcontractors agreed to perform or that the subcontractors breached their respective contracts.

The only conclusion that can be reached from Highmark's lack of evidence of the agreements is that the subcontractors performed per the agreement with, and direction of, Highmark, and that no breach occurred.

As to the argument that subcontractors must comply with codes, the record again fails to show which, if any, code the subcontractors were to comply with. There is no basis in fact or law to support an argument that subcontractors somehow become guarantors of an owner provided design. In fact, Washington law is directly contrary to Hay's argument on this issue. Under Washington law, when a subcontractor is required to build in accordance with specifications furnished by the owner (here Highmark), it is the owner, not the subcontractor, who impliedly guarantees that the specifications provided are sufficient and workable.

Based on the complete lack of evidence of the alleged contractual duties, or their alleged breaches, the dismissals of ABSI and BQF should be affirmed.

## II. STATEMENT OF THE CASE

### A. Procedural History of Underlying Lawsuit

Hay filed a complaint against Highmark on May 15, 2014. CP 1645. A year later, on May 8, 2015, Highmark filed its third-party complaint against various subcontractors. CP 1656 – 1663. BQF and ABSI both issued interrogatories and requests for production to

Highmark. CP 1665, CP 1721. BQF requested that Highmark produce any alleged contract documents and that it identify the contractual basis for its third-party claims against BQF. CP 1669 – 1670, CP 1673 – 1675, 1677. Highmark provided written responses to the discovery, but could not produce a written contract between Highmark and BQF, or identify the factual bases for its allegations against BQF. *Id*. ABSI made the same requests as BQF. Highmark answered the discovery, but could not produce a complete written contract between Highmark and ABSI on the Project, or identify the factual bases for its allegations against ABSI. CP 1725, 1729 – 1731.

The discovery cut off and trial were fast approaching, and BQF and ABSI were forced to file motions for summary judgment asking to the Court to dismiss all claims against them based on the lack of evidence. A master agreement related to ABSI was produced for the first time with Highmark's response to the ABSI motion. CP 2007. The master agreement does not specify this Project. No document has been presented that incorporates the terms of this master agreement for this Project. The BQF and ABSI motions were heard on July 29, 2016, two days after discovery cut off. CP 1992; CP 2147– 2154. The trial court dismissed all claims except breach of contract. The remaining claims were subsequently dismissed on August 26, 2016. CP 2357.

### B. Highmark Testified that the Subcontractors' Work Met Its Expectations.

Highmark was the developer and general contractor on the Project. Initial Brief of Appellants at pg. 2; CP 1660. Highmark supplied all materials for the Project it wanted installed on the project, except for roofing and drywall materials. CP 1673. Highmark testified that it employed multiple superintendents and employees whose scope of responsibility was to "supervise[] construction" at the Project. CP 1672. Highmark testified that its superintendents' number one job was to walk every house, every day and to make sure the subcontractor's work was done properly. CP 1697 – 1698. Highmark testified that its onsite superintendents were very familiar with the fundamentals of framing and siding. CP 1701 – 1702. Highmark testified that the framing and siding work at the Project was performed correctly and to Highmark's expectations. CP 1701. Highmark testified that it would not pay a framing subcontractor until the work passed inspection. CP 1702. The buildings were inspected by City of Fife and the City issued certificates of occupancy for the buildings. CP 1676.

### C. Facts Related to BQF.

Jose Gonzales was a member of BQF. CP 1694. BQF was in existence only from 2011 – mid 2014. CP 1694. Mr. Tollen, was the

30(b)(6) designee of behalf of Highmark, and testified that "Jose" had a contract with Highmark, but acknowledged during his deposition that "Jose" worked for a different company when he began working with Highmark in about 2008. CP 1700.

Mr. Tollen testified during his deposition that he was unsure of whether the agreement that he believed "Jose" entered into with Highmark was a "master contract" or a "project-specific" contract. *Id.* Mr. Tollen also testified that he could not state with certainty whether it would have been Mr. Tollen or someone else at Highmark that would have entered into this alleged contract, of an unknown type or date, with "Jose." CP 1700. In the end, Mr. Tollen testified that despite a diligent search, Highmark did not find a copy of any written agreement with BQF related to this Project. CP 1699 – 1700. In fact, Highmark could not locate written contracts for a number of its subcontractors. *Id*. Highmark failed to present any witness that can verify a specific form of written contract that allegedly existed between it and BQF for any of the homes at the Project.

Highmark failed to produce any document that identifies this Project and references or incorporates any master agreement with BQF. Highmark failed to produce any document that includes the subject matter of the contract, the promise, the terms and conditions, and price for the Project. There is no document that identifies a scope of work, a bid

proposal, an estimate, a detailed listing of plans, specifications, installation instruction, details, or materials to be installed by BQF. There is no document identifying what portions of what buildings BQF agreed to work on, or how that work was to be performed. There is no evidence regarding whether the scope of work included installation of a weather resistive barrier, specific types of flashing, windows, or any other materials. Mr. Tollen, as the Highmark designee, had no information about the scope of work agreed to with ABSI or BQF on the Project. CP 2026 – 2032. Other than very general invoicing, there simply is no evidence regarding which entity or person was responsible for doing what portions of the work.

The only evidence in the underlying summary judgment record about whether BQF's work was per agreement with Highmark, was Mr. Tollen's testimony. Mr. Tollen of Highmark testified that (a) BQF's work was inspected daily by Highmark superintendents that were knowledgeable in framing and siding, (b) Highmark believed the houses were built correctly, and (c) BQF was paid for its work after inspection, reflecting the work met Highmark's expectations. CP1701, CP 1697 – 1698 and CP 1688 – 1692.

Mr. Tollen testified that Highmark would not have paid BQF until its framing labor passed inspection. CP 1702. The evidence shows that BQF's work was inspected daily, by knowledgeable Highmark

superintendents, and that BQF was paid for its work after inspection reflecting the work met Highmark's expectations. CP 1697 – 1698, CP 1688 – 1692, CP 1701 – 1702.

**D. Facts Related to ABSI.**

As with BQF, ABSI was one of many subcontractors to Highmark and provided some of the framing on a limited number of the homes at the Project. CP 1729. ABSI provided Project labor to Highmark on an as-requested basis and issued invoices after Highmark approved the work. CP 1745 – 1751. ABSI dissolved in early 2015. CP 1753.

Despite prior discovery requests, Highmark produced a Master Agreement form, with ABSI's name, for the first time at the end of discovery cut off and only in response to ABSI's motions for summary judgment. CP 2007.

The Master Agreement does not reference the Project or any of the homes worked on by ABSI in the underlying lawsuit. There is no other document that incorporated the Master Agreement. There is no separate document that includes the subject matter of the contract, the promise, the terms and conditions, and price for the Project. There is no document that identifies a scope of work, a bid proposal, an estimate, a detailed listing of plans, specifications, installation instruction, details, or materials to be installed by ABSI. There is no document identifying what portions of

what buildings ABSI agreed to work on, or how that work was to be performed. There is no evidence regarding whether the scope of work included installation of a weather resistive barrier, specific types of flashing, windows, or any other materials. Mr. Tollen, as the Highmark designee, had no information about the scope of work agreed to with ABSI on the Project. CP 2026 – 2028. Other than very general invoicing, there simply is no evidence regarding which entity or person was responsible for doing what portions of the work.

As with BQF, the evidence about whether ABSI's work was per agreement with Highmark, was Mr. Tollen's testimony that (a) ABSI's work was inspected daily by Highmark superintendents that were knowledgeable in framing and siding, (b) Highmark believed the houses were built correctly, and (c) ABSI was paid for its work after inspection, reflecting the work met Highmark's expectations. CP1701, CP 1697 – 1698, CP 1688 – 1692. Mr. Tollen testified that Highmark would not have paid ABSI until its framing labor passed inspection. CP 1702. The evidence shows that ABSI's work was inspected daily by knowledgeable Highmark superintendents and that ABSI was paid for its work after inspection reflecting the work met Highmark's expectations. CP 1688 – 1692.

## III. ARGUMENT

### A. Standard of Review

The court of appeals reviews a summary judgment de novo, performing the same inquiry as the trial court. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). The appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12. "The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered." *Id.* The three orders at issue related to BQF and ABSI were entered on July 29, 2016 [CP 2147 – 2150; CP 2151 – 2154] and August 26, 2016 [CP 2357].

Hay designated well over a fourteen hundred pages of Clerk's Papers (CP) 1 – 1483, 1504 – 1562 and 1861 1865, which were not considered by the lower court or identified in the orders on summary judgment subject of this review. On August 8, 2017 ABSI and BQF moved to Strike Portions of the Initial Brief of Appellants and Record on Review.[1] Appellant responded and included an Amended Initial Brief of

[1] The basis of the motion included: (1) that Appellants included over 1400 pages of Clerk's Papers, that were not cited to in the underlying motions for summary judgment and were not designated as document or evidence called to the attention of the trial court on the ABSI's and BQF's motions for summary judgment, and (2) failure to cite to the record.

Appellants with additional citations to the record. On September 13, 2017, Commissioner Schmidt entered a ruling denying the motions to strike. Appendix A-1. The Commissioner did not state the reason for denying the motion to strike.

When there is no genuine issue of material fact, summary judgment will be granted if the moving party is entitled to judgment as a matter of law. *Lybbert*, 141 Wn.2d 34. On summary judgment, the facts, and all reasonable inferences to be drawn from them, are viewed in the light most favorable to the nonmoving party. *Id.*

The moving party may meet its burden by pointing out to the court the absence of evidence to support the non-moving party's case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 225, 770 P.2d 182 (1989). When the moving party meets this initial showing, the non-moving party must demonstrate a question of fact as to all elements essential to its claims. *Young*, 112 Wn.2d at 255. The non-moving party may not rely upon the mere allegations of its pleadings, unsupported conclusory allegations, or argumentative assertions. *Absher Const. Co. v. Kent Sch. Dist. No. 415*, 77 Wn. App. 137, 141-42 (1995).

A defendant is entitled to summary judgment when there is an absence or insufficiency of evidence supporting an element that is

essential to the plaintiff's claim." *Tacoma Auto Mall, Inc. v. Nissan N. Am., Inc.*, 169 Wn. App. 111, 118, 279 P.3d 487 (2012) citing *Young*, 112 Wn.2d at 225. "In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Young*, 112 Wn.2d at 225 citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

### B. Highmark Failed to Prove the Essential Elements of a Breach of Contract.

Highmark failed to prove the elements of a breach of contract. A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant. *Northwest Independent Forest Mfrs. v. Dept. of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995). The burden of proving a contractual term is on the party asserting it, here Highmark. *Machersky v. Countrywide Funding Corp.*, 105 Wn. App. 846, 851, 22 P.3d 804 (2001).

#### 1. Highmark Failed to Prove the First Element of Breach of Contract – A Contractual Duty.

A contract is created when the essential elements of a contract, "the subject matter of the contract, the parties, the promise, the terms and conditions, and (in some but not all jurisdictions) the price or

consideration," have been included in the agreement. *DePhillips v. Zolt Constr. Co., Inc.*, 136 Wn.2d 26, 31, 959 P.2d 1104, 1107 (1998).

**a. Highmark Failed to Prove BQF's Contractual Duty.**

Highmark failed to produce any written agreement by which BQF was bound to Highmark on this Project. Highmark failed to meet its burden to present any competent evidence, rather than vague conclusory allegations or argumentative assertions that some written agreement between it and BQF on the Project existed. Highmark failed to present a single witness that could state what, if any, written agreement BQF entered into on the Project. Mr. Tollen confirmed in his testimony that he did not know if there was a "master contract" or a "project-specific contract" with BQF. CP 1700. Mr. Tollen also testified that someone other than him may have negotiated agreements with the principal of BQF. *Id*. Highmark failed to present any document, a bid proposal, or an estimate for the Project, or any home at the Project, that incorporated any master agreement.

Highmark failed to identify the material terms of any alleged contract, and thus fails not only in establishing that a written contract existed, but it failed to establish any specific contractual duties to which BQF agreed to perform. CP 1669 – 1670, CP 1673 – 1675, 1677.

As was stated in the Statement of the Case, there is no written agreement identifying (a) the exact scope of work to be performed (ex. weather resistive barrier, specific flashings, windows, doors, stairs, etc.), (b) a list of plans, specifications, or installation details or codes to be complied with, (c) the materials to be installed by BQF, or (d) any agreement to provide a warranty, defense, indemnity, or insurance.

Hay's argument that implied warranties should be incorporated into a construction agreement has been rejected by the Washington State Supreme Court, which held that implied warranties of workmanlike performance are not recognized in construction contracts. *Urban Dev., Inc. v. Evergreen Bldg. Prod.'s, LLC*, 114 Wn. App. 639, 644-47, 59 P.3d 112 (2002). Not only has the implied warranty argument been rejected by the Washington Supreme Court, but the contract at issue here is between a framing/siding subcontractor and Highmark, a developer who acted as its own general contractor, knowledgeable in framing and siding work, who not only inspected the subcontractor's installation daily, but also ordered all the materials it expected the subcontractors to install.. CP 1697 – 98, 1701, 1673.

Highmark failed to establish any agreed upon contractual duty, in other words, any standards to which the parties agreed that BQF was to

perform. Therefore the summary judgment was properly granted and should be affirmed.

**b. Highmark Failed to Prove ABSI's Contractual Duty.**

The only distinction with regard to ABSI, is that Highmark belatedly, in response to ABSI's summary judgment motion, submitted a Master Agreement with ABSI. However, Highmark failed to submit any document that incorporated the Master Agreement for this Project. Extrinsic evidence is not admissible for the purpose of adding to, modifying, or contradicting the terms of a written integrated contract, in the absence of fraud, accident, or mistake. *Berg v. Hudesman*, 115 Wn.2d 657, 669-670, 801 P.2d 222 (1980). Highmark failed to present any document, a bid proposal, or an estimate for the Project, or any home at the Project, that incorporated the terms of the Master Agreement.

Highmark has failed to identify the material terms of any alleged contract, and thus failed not only in establishing that a written contract existed, but it failed to establish any specific contractual duties to which ABSI agreed to perform.

As with BQF, there is no written agreement identifying (a) the exact scope of work to be performed (ex. weather resistive barrier, specific flashing, windows, doors, stairs, etc.), (b) a list of plans, specifications, or

installation details or codes to be complied with, (c) or the materials to be installed by ABSI.

ABSI, like the other framing subcontractors, provided Highmark with labor, which Highmark directed and accepted by reviewing the work and issuing payment without objection.

Because Highmark cannot prove any breach of contract related to ABSI's work, or that any of the claims in this matter arise out of anything other than Highmark's sole acts, omissions or negligence, the Court properly dismissed all Highmark's claims against ABSI.

**2. Highmark Failed to Prove the Second Element – A Breach of a Contractual Duty by BQF or ABSI**.

"When one party performs under contract, and the other party accepts his performance without objection, it is assumed that such performance was the performance contemplated by the contract. 17A C.J.S. *Contracts* § 590, p. 1144." *Evans v. Laurin*, 70 Wn.2d 72, 76, 422 P.2d 319, 321 (1966). Although Washington abrogated the "completion and acceptance" doctrine as to tort liability for injuries to third parties in *Davis v. Baugh Indus. Contractors*, 159 Wash. 2d 413, 417, 150 P.3d 545, 546 (2007), it has not changed the rule as it relates to contract damages and purely economic losses between two contracting parties.

Highmark, through Mr. Tollen, testified that (a) the framing and siding subcontractor's (including BQF's and ABSI's) work was inspected daily by knowledgeable Highmark superintendents, (b) Highmark felt the houses were built correctly, and (c) BQF and ABSI were paid for their respective work after inspection, reflecting the work met Highmark's expectations. CP 1697 – 1698 and CP1701 – 1702.

Mr. Tollen testified that Highmark would not have paid BQF or ABSI until their framing labor passed inspection. CP 1702. Mr. Tollen testified that Highmark's onsite superintendents were very familiar with the fundamentals of framing and siding. CP 1701. Highmark had superintendents on site whose number one job was to walk every house, every day, to communicate with subcontractors and make sure the subcontractor's work was done properly. CP 1697 – 1698. The evidence shows that BQF's and ABSI's work was inspected daily by knowledgeable Highmark superintendents and BQF and ABSI were paid for their work after inspection, confirming that the work met Highmark's expectations. CP 1697 – 1698, 1688 – 1692, 1701 – 1702, 1745 – 1751.

The only evidence Hay now tries to include on appeal, which was *not* considered by the lower court, are pleadings and expert reports submitted on the Johnson home, which Plaintiff conceded had nothing to do with the ABSI or BQF homes. *See* Appendix B - July 29, 2016

Verbatim Report of Proceedings, pg. 21. This was also confirmed in the original hearing by Plaintiff's counsel, Mr. Casey, when he confirmed the motion related to the Johnson home was only "on one house." CP 961. Because different contractors worked on different homes, the trial court was also clear that the motion dealt only with the Johnson home, and that the ruling relating to the Johnson home would not apply to the remaining homes. CP 961, 984.

Similarly, the expert reports and other documents related to the motions on the Johnson home[2] were not considered by the lower court on the ABSI and BQF motions for summary judgment and as such, ABSI and BQF had no opportunity to respond.[3] Under RAP 9.12 these documents and new arguments on appeal should not be considered on denovo review of summary judgment orders. *Green v. Cmty. Club*, 137 Wn. App. 665, 677-681, 151 P.3d 1038, 1046 (2007).

Even if the Court considered the documents, it is clear that Highmark failed to present any evidence that BQF or ABSI performed any labor or installation that was out of compliance with any agreement the subcontractors had with Highmark. There is no witness that testified as to the scope of work that the subcontractors were to perform or that the scope

[2] Including for example, CP 386-420; CP 422- 504; CP 496 – 504; CP 656; CP 666-667 682-683.

[3] Clerk's Papers 1 – 1483, 1504-1562 and 1861-1865, were not identified as considered in the orders on the motions for summary judgment that are the subject of this appeal.

of work was not to Highmark's directives. As will be discussed in more detail in section D below, when subcontractors build to an owner's (here Highmark's) specifications, they cannot be held liable for any resultant defects or damages. *Weston v. New Bethel Missionary Baptist Church*, 23 Wn. App. 747, 753-54, 598 P.2d 411 (1978).

The facts remain that Highmark failed to establish a breach of contract, or a breach of warranty, and therefore the trial court properly dismissed the case and the dismissal should be affirmed.

### C. BQF and ABSI Had No Duty to Defend or Indemnify Highmark.

#### 1. Indemnity Agreements Cannot Arise by Implication and Must be in Writing.

Washington construction law provides that indemnity agreements cannot arise by implication and must be in writing. *Stocker v. Shell Oil Co,* 105 Wn. 2d 546, 716 P.2d 306 (1986); *see* RCW 4.24.115. RCW 4.24.115 provides in pertinent part as follows:

> (1) A covenant . . . in connection with . . . a contract or agreement relative to the construction . . . of, any building . . . purporting to indemnify, including the duty and cost to defend, against liability for damages arising out of such services or out of . . . damage to property:
>
> . . .
>
> (b) Caused by or resulting from the concurrent negligence of (i) the indemnitee or the indemnitee's agents or employees, and (ii) the indemnitor or the indemnitor's agents or employees, is valid and enforceable only to the extent of the indemnitor's

> negligence and only if the agreement specifically and expressly provides therefor . . . .

To prove an indemnity claim, "a plaintiff must demonstrate that there exists a contract containing an indemnity provision that binds the defendant to reimburse the plaintiff for the amount claimed." *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 757, n.3, 162 P. 3d 1153 (2007). Washington does not recognize implied or equitable indemnity in construction contracts. *Urban Dev*, 114 Wn. App. at 644-47; *Arango Constr. Co. v. Success Roofing, Inc*., 46 Wn. App. 314, 317-20, 730 P.2d 720 (1986). Thus, absent an express contractual indemnity clause, a contractor is not entitled to indemnity from its subcontractors.

**2. Highmark Cannot Prove An Indemnity Agreement With BQF Existed on this Project.**

Highmark cannot prove that there was a written indemnity agreement between Highmark and BQF related to the Project, or any specific home that is the subject of this lawsuit, that would require BQF to defend or indemnify Highmark. The absence of proof of a written indemnity clause is fatal to Highmark's claim, because such provisions cannot be implied in Washington construction contracts.

Any Highmark allegation that it believes some written document was entered into by BQF's member, Jose Gonzales, amounts to no more than

unsupported, conclusory allegations, or argumentative assertions, which are insufficient to deny a motion for summary judgment.

BQF was only in business from 2011 to mid-2014. Mr. Tollen confirmed that he worked with "Jose" for three or four years prior to this Project and that Jose, at that earlier time, worked for a different entity. CP 1700, CP 2029 – 2030. Mr. Tollen testified during his deposition that he did not know if the contract he believed existed was a project-specific agreement or a master agreement. CP 1700. Highmark cannot establish that any such agreement existed, the terms of any such agreement, or that such agreement actually applied to this Project or the BQF.

In fact, Mr. Tollen did not recall whether he was the one that specifically entered into a contract with "Jose," or if it was someone else at Highmark. When Mr. Tollen was <u>not</u> the sole person to enter into contracts behalf of Highmark, and could not testify with certainty whether he or someone entered into the agreement with BQF on the project, and could not locate a copy of the alleged master agreement, a blanket declaration that Highmark has a master agreement with all subcontractors, is simply a conclusory allegation insufficient to overcome summary judgment.

Mr. Tollen testified that Highmark performed a diligent search to locate a contract with BQF, and no one has been able to locate a written

contract or written indemnity/defense agreement with BQF that applies to this Project. The defense and indemnity claims against BQF were properly dismissed by the trial court and should be affirmed.

### 3. There is No Document to Incorporate the ABSI Master Agreement for this Project.

Although on the eve of discovery cut off, Highmark located a master agreement related to ABSI, the master agreement does not specify this Project. Highmark has not produced a document that incorporates the terms of the master agreement into any agreement for this Project. Washington construction law provides that indemnity agreements cannot arise by implication and must be in writing. *Stocker*, 105 Wn. 2d 546; RCW 4.24.115. Highmark has failed to establish in writing that a valid indemnity agreement existed on this Project.

### 4. Breach of Duty to Defend and Indemnity Were Properly Dismissed as to BQF and ABSI.

The existence of a duty to defend is determined by the facts known at the time of the tender of defense. *George Sollitt Corp. v. Howard Chapman Plumbing & Heating, Inc.*, 67 Wn. App. 468, 475, 836 P.2d 851 (1992). These facts "must demonstrate that liability would eventually fall upon the indemnitor, thereby placing it under a duty to defend." *Id.* at 472; quoting *Dixon v. Fiat-Roosevelt Motors, Inc.*, 8 Wn. App. 689, 694, 509 P.2d 86 (1973). Unlike an insurance contract, the duty to defend under a

construction contract is not triggered until facts are established to demonstrate liability would fall upon the subcontractor. *Id.* Indemnification agreements in construction contracts may not require an indemnitor to indemnify or defend the indemnitee for the indemnitee's sole negligence. *RCW* 4.24.115; *Stocker*, 105 Wash. 2d 549.

A construction subcontract, which contains an agreement to indemnify from claims arising out of, in connection with or incident to a subcontractor's performance does not obligate the subcontractor to indemnify the contractor, unless an overt act or omission on the part of the subcontractor in its performance in some way causes or concurs in causing the loss involved. *Jones v. Strom Constr. Co.*, 84 Wn.2d 518, 521-22, 527 P.2d 1115, 1118 (1974).

Hay alleges that the trial court entered an order stating that the construction failed to comply with the plans and applicable codes and that Highmark tendered the order and requested ABSI accept tender. Amended Initial Brief of Appellants pg. 22. There is no evidence to support this allegation. Hay's counsel confirmed at oral argument on the BQF and ABSI motions for summary judgment that the referenced order did not relate to the homes worked on and subject of the BQF or ABSI motions. CP 1478 – 1483; *See* Appendix A-2 - July 29, 2016 Verbatim Report of Proceedings, at pg. 21. This was also confirmed in the original

hearing by Plaintiff's counsel, Mr. Casey, when he confirmed the motion related to the Johnson home related only to the "one house." CP 961. Because different contractors worked on different homes, the trial court was also clear that the motion dealt only with the Johnson home, and that the ruling relating to the Johnson home would not apply to the remaining homes. CP 961, 984.

Even if there was a question of a fact as to whether an indemnity agreement existed, there was no valid tender of defense to demonstrate that liability would eventually fall on BQF or ABSI. The facts at the time of a tender must demonstrate that liability would eventually fall upon the indemnitor, thereby placing it under a duty to defend. Those facts do not exist here. No alleged tender in this case identified why or how BQF or ABSI were responsible for the alleged defects. In fact, Highmark denied the owner claims of defects. CP 1669; CP 1725. All the testimony by Highmark indicates that BQF and ABSI performed to Highmark's expectations.

Highmark failed to establish that ABSI's or BQF's acts, rather than Highmark's or another contractor's acts, caused the alleged claims or damage. The Legislature, in RCW 4.24.115, decreed that indemnification agreements in construction contracts may not require an indemnitor to indemnify or defend the indemnitee for the indemnitee's sole negligence. RCW 4.24.115.

Highmark cannot show facts sufficient to prove the elements of its claim, therefore the dismissal of the defense and indemnity claims were properly dismissed and the dismissal should be affirmed.

### D. Hay's Argument About Code is in Error and Should be Summarily Rejected.

Typically the owner/developer determines what it wants to have built, and works with architects and engineers to produce a design to build to. The design of buildings is typically done by engineers and architects, not subcontractors. The codes change and different counties and cities can adopt varying codes. Depending on when a permit is issued, a different code may apply. Compliance with codes can also be met through varying methodologies. Subcontractors do not warrant that an owner's plans and specifications submitted to the permitting agency comply with code.

The *Spearin* rule recognized this, and held that a subcontractor cannot be responsible for a failure in the plans, directives and specification of the owner. *U.S. v. Spearin*, 248 U.S. 132, 136 (1918). The *Spearin* rule was adopted in Washington:

> It is a well established rule in Washington that when ... a contractor is required to build in accordance with plans and specifications furnished by the owner, it is the owner, not the contractor, who impliedly guarantees that the plans are workable and sufficient.

*Weston*, 23 Wn. App. at 753-54, 598 P.2d 411 (1978).

There is a long line of cases upholding this rule. *See Ward v. Pantages*, 73 Wash. 208, 131 P. 642 (1913) (held failure of a plumbing and heating system installed by subcontractor in conformity with plans and specifications would not defeat right of subcontractor to mechanics lien); *Huetter v. Warehouse & Realty Co*., 81 Wash. 331, 142 P. 675 (1914) (contractor excused from completing contract for large fill and viaduct, whose walls collapsed, where plans and specifications prepared by city's engineer were defective); *Novelty Mill Co. v. Heinzerling*, 39 Wash. 244, 81 P. 742 (1905) (contractor not liable for collapse or weakening of piers, where concrete was well tamped underwater as contract required, and where damage was caused by fault of contract in requiring that to be done); *Clark v. Fowler*, 58 Wn.2d 435, 363 P.2d 812 (1961) (contractor is not a guarantor of proper functioning of furnace installed in accordance with contractee's plans and contract); *Teufel v. Wienir*, 68 Wn.2d 31, 411 P.2d 151 (1966) (contractor not liable for leak of curtain wall where wall was constructed in accordance with specifications which called for design improper for intended use); *Tyee Constr. Co. v. Pacific Northwest Bell Tel. Co*., 3 Wn. App. 37, 472 P.2d 411 (1970) (contractor not liable for leak of curtain wall where wall was

constructed in accordance with specifications which called for design improper for intended use).

Hay would like to turn contractors and subcontractors, many of which only provide labor, into licensed engineers and architects. To do so would change the relationships and turn the construction world into chaos. In the end, the issue comes back to the same set of facts. Highmark has not introduced any admissible evidence that BQF or ABSI failed to build per the Highmark's specifications, directives or any agreed upon code sections. Instead the evidence reflects that BQF and ABSI performed to Highmark's expectations. The trial court properly dismissed the case against BQF and ABSI and the dismissal should be affirmed.

**E. Highmark has no Basis to Claim Attorney Fees or Costs**

A superior court has no power to award attorney fees unless authorized by statute, contract, or recognized ground of equity. *Bongirno v. Moss*, 93 Wn. App. 654, 658, 969 P.2d 1118 (1999), overruled on other grounds by *Malted Mousse, Inc. v. Steinmetz*, 150 Wn. 2d 518, 531, 79 P.3d 1154 (2003).

There is no right at common law to recover attorney fees. Further, the allocation of risk in construction contracts is to be determined strictly from the contract's terms. *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn. 2d 816, 826-27, 881 P.2d 986 (1994). Again, there is

no written contract or other contractual provision allowing Highmark to recoup its costs or attorney fees on this Project. Even if there was, Highmark has not proven its claims against BQF or ABSI and the matter was properly dismissed, in which case Highmark would not be the prevailing party. Because Highmark cannot support its claim, this claim was properly dismissed and should be affirmed.

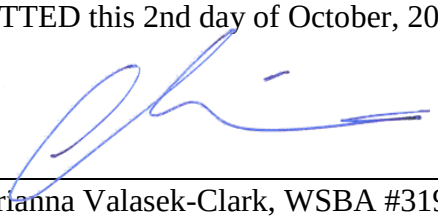
## IV. CONCLUSION

The underlying case had completed discovery and was ready for trial when the summary judgment motions were heard. Despite being at the conclusion of the discovery process, Highmark could not provide a document or the terms of any written agreement that shows that the subcontractors breached their respective contracts, therefore the claims were properly dismissed. Highmark inspected and accepted the subcontractors' work as it was being performed. The Court should not assist Highmark by rewriting the terms of its agreement with the subcontractors and imposing duties that the subcontractors did not assume.

Highmark and Hay failed to provide evidence of the essential elements of a contract. There is no written contract or testimony that identifies what portions of what buildings the subcontractors agreed to work on, or how that work was to be performed, or that the subcontractors failed to build per their agreement with Highmark.

Based on the complete lack of evidence that the subcontractors failed to perform their work as agreed upon, a dismissal of Highmark's indemnification and defense claims were also proper. Similarly, there is no evidence of a claim of breach of obtaining proper insurance. For these reasons and those listed above, the Court should affirm the lower court's dismissals of Highmark's claims against BQF and ABSI.

RESPECTFULLY SUBMITTED this 2nd day of October, 2017.



By: _____

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## VII. APPENDIX

A-1 September 13, 2017 Ruling by Commissioner Schmidt

A-2 July 29, 2016 Verbatim Report of Proceedings, pg. 21

## CERTIFICATE OF SERVICE

I, Jamie Kirk, declare as follows:

1) I am a citizen of the United States and a resident of the state of Washington. I am over the age of 18 and not a party to the within entitled case.

2) By the end of the business day on October 2, 2017, I caused to be served in the manner described below, the foregoing document:

| | |
|---|---|
| **Attorneys for Appellants**<br>Todd K. Skoglund WSBA No. 30403<br>Casey & Skoglund PLLC<br>130 Nickerson Street, Suite 210<br>Seattle, WA 98109 | [ ] Facsimile<br>[ ] Via Messenger<br>[ ] Via US Mail<br>[ ] UPS Next Day Air<br>[x] Via Email |
| **Attorneys for Respondent S & S Home Repair, Inc.**<br>John E. Drotz WSBA No. 22374<br>Glen E. Bowen WSBA No. 48892<br>Clement & Drotz PLLC<br>100 West Harrison Street<br>North Tower, Suite N 350<br>Seattle, WA 98119 | [ ] Facsimile<br>[ ] Via Messenger<br>[ ] Via US Mail<br>[ ] UPS Next Day Air<br>[x] Via Email |
| **Attorneys for Respondent AAA Framing Corporation**<br>Anthony R. Scisciani III WSBA No. 32342<br>Scheer Law Group LLP<br>701 Pike Street, Suite 2200<br>Seattle, WA 98101 | [ ] Facsimile<br>[ ] Via Messenger<br>[ ] Via US Mail<br>[ ] UPS Next Day Air<br>[x] Via Email |

Court of Appeals – via Washington State Appellate Court's eFiling Portal

///

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 2nd day of October, 2017.

Jamie Kirk
Litigation Manager

# Appendix A 1

# Washington State Court of Appeals
## Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454
Derek Byrne, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)
General Orders, Calendar Dates, and General Information at http://www.courts.wa.gov/courts **OFFICE HOURS**: 9-12, 1-4.

September 13, 2017

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CASE #: 50227-5-II
Maureen Hay, et al, Appellants v Highmark Homes, LLC, et al, Respondents

Counsel:

On the above date, this court entered the following notation ruling:

**A RULING BY COMMISSIONER SCHMIDT:**

The motions to strike portions of the initial brief of appellants and portions of the record on review are denied. The motions to dismiss Appellants' appeal are denied. The Respondents are granted an extension to October 2, 2017 to file their briefs.

Very truly yours,

Derek M. Byrne
Court Clerk

# Appendix A 2

form they have used and Mr. Tollen testified that everyone signed or they weren't allowed on job sites.

The indemnity agreement, they raise a couple points. I think there is not a question for ABSI. The agreement says what it says. It gets around the sole liability of Highmark, so I think it's a valid and enforceable agreement.

I do agree -- and I will differ from Highmark Homes on this -- according to Barbee v -- it's been forever since I looked at it -- indemnity doesn't accrue until you pay or be adjudged to pay. Unfortunately, you are not going to like this, Your Honor, but that's going to mean we are going to have to do a reasonableness hearing in front of you and get a judgment entered. So what that does to a trial date or whatever, we are going to have to deal with. But that's coming down the pike, just to let you know and you are not surprised for it. But I do agree at this time they haven't accrued because you have to pay your judgment and there is no judgment.

The duty to defend. You entered an order saying the construction out there was not to code; it was horrible; there is damage. Counsel will argue, "Well, that's not our house." I would -- she is right there. But in this case, I submitted with the declaration

# JAGER CLARK PLLC

## October 02, 2017 - 4:02 PM

## Transmittal Information

| | |
|---|---|
| **Filed with Court:** | Court of Appeals Division II |
| **Appellate Court Case Number:** | 50227-5 |
| **Appellate Court Case Title:** | Maureen Hay, et al, Appellants v Highmark Homes, LLC, et al, Respondents |
| **Superior Court Case Number:** | 14-2-08793-0 |

**The following documents have been uploaded:**

- 4-502275_Briefs_20171002160000D2585039_9291.pdf
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**Filing on Behalf of:** Marianna Valasek-Clark - Email: marianna@jagerclark.com (Alternate Email: )

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